

BETTY ANN POGARSKY  
V.  
DEPARTMENT OF THE TREASURY

Docket No.  
NY315H09023

### OPINION AND ORDER

This case comes before the Board on a petition for review of an initial decision of the Board's New York Field Office which affirmed the removal of Betty Anne Pogarsky (hereinafter "appellant"), a contact representative with the Internal Revenue Service. The termination of appellant occurred during her probationary period and was based on conditions arising before her appointment.

Appellant appealed her removal contending that the agency failed to follow a specific provision incorporated in an applicable collective bargaining agreement which required the agency to meet, upon request, with an employee whose termination had been proposed. The presiding official assumed jurisdiction, reviewed the collective bargaining agreement provisions, and determined that the agency did not, in fact, fail to comply with the additional procedural requirement contained therein.

Appellant, in her petition for review, basically challenges the factual determinations made by the presiding official and, as such, the petition does not fulfill the criteria of 5 C.F.R. § 1201.115 and is hereby DENIED. However, because we believe that the presiding official erred when he assumed jurisdiction over this appeal, we have determined that the case must be REOPENED to correct this jurisdictional finding. 5 C.F.R. § 1201.117.

The Board may assume jurisdiction over the appeal of a probationary employee under the provisions of 5 C.F.R. § 315.806 which states in relevant part:

(c) On improper procedure. A probationer whose termination is subject to section 315.805 may appeal on the ground that his termination was not effected in accordance with *the procedural requirements of that section*. (Emphasis added).

The procedural requirements of 5 C.F.R. § 315.805 provide that the employee is entitled to (a) advance written notice of the proposed adverse action and the reasons therefor; (b) a reasonable time to respond thereto and to have his response considered by the agency in making its decision; and (c) written notice of and reasons for the adverse decision at or before the effective time of the action, information pertaining to appeal rights, and time limitations involved in exercising those rights.

In the instant case, appellant's allegation of procedural error was based on an alleged violation of a negotiated agreement rather than the provisions of 5 C.F.R. § 315.805. In fact, the record reflects that the

agency has complied with all the procedural requirements imposed by that section. While a collective bargaining agreement can increase the procedural entitlements of a probationary employee terminated for pre-employment (or post-employment) reasons beyond those found in 5 C.F.R., Part 315, those additional safeguards do not become organic extensions of those regulations but, rather, additional benefits which accrue outside of the appeal right provided by 5 C.F.R. § 315.806. Compliance with such additional procedural entitlements can only be enforced through the negotiated grievance procedure. To hold otherwise would permit the parties to a collective bargaining agreement to create a basis for the Board's jurisdiction not authorized by statute, rule, or regulation. An agreement between an agency and its employees simply cannot serve to confer jurisdiction on the Board. *Allen v. Department of Housing and Urban Development*, 5 MSPB 297 (1981). Consequently, the Board's review of improper procedural allegations in probationary terminations based on pre-employment reasons is limited to a review of compliance with 5 C.F.R. § 315.805.

Accordingly, the initial decision is VACATED and the case is DISMISSED based on a finding that the Board was without jurisdiction to entertain the appeal. 5 U.S.C. § 7701(a).

This is a final decision of the Merit Systems Protection Board. 5 C.F.R. § 1201.113(c). Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review of this decision may be filed in the appropriate United States Court of Appeals or the United States Court of Claims no later than thirty (30) days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,  
*Secretary.*

WASHINGTON, D.C., July 20, 1981